



## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**[Docket No. FWS–R4–ES–2016–0002; 4500030113]**

**RIN 1018–BA95**

### **Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Elfin-woods Warbler**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the elfin-woods warbler (*Setophaga angelae*) under the Endangered Species Act (Act). In total, approximately 10,977 hectares (ha) (27,125 acres (ac)) in the Maricao, San Germán, Sabana Grande, Yauco, Río Grande, Canovanas, Las Piedras, Naguabo, Ceiba, Cayey, San Lorenzo, Guayama, and Patillas Municipalities in Puerto

Rico fall within the boundaries of the proposed critical habitat designation. If we finalize this rule as proposed, it would extend the Act's protections to this species' critical habitat. We also announce the availability of a draft economic analysis for the proposed designation.

**DATES:** We will accept comments on the proposed rule or draft economic analysis that are received or postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** *Written comments:* You may submit comments on the proposed rule or draft economic analysis by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. In the Search box, enter Docket No. FWS–R4–ES–2016–0002, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2016–0002; U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Information Requested**, below, for more information).

*Document availability:* The draft economic analysis is available at <http://www.fws.gov/caribbean>, at <http://www.regulations.gov> at Docket No. FWS–R4–ES–2016–0002, and at the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

The coordinates, plot points, or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at <http://www.fws.gov/caribbean>, at <http://www.regulations.gov> at Docket No. FWS–R4–ES–2016–0002, and at the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Fish and Wildlife Service website and Field Office set out above, and may also be included at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Marelisa Rivera, Deputy Field

Supervisor, U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office, P.O. Box 491, Boquerón, PR 00622; telephone 787-851-7297; facsimile 787-851-7440. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

## **SUPPLEMENTARY INFORMATION:**

### **Executive Summary**

*Why we need to publish a rule.* Under the Endangered Species Act, when we determine that a species is endangered or threatened, we must designate critical habitat to the maximum extent prudent and determinable. Designations of critical habitat can only be completed by issuing a rule.

*This document consists of:* a proposed rule to designate critical habitat for the elfin-woods warbler. We have determined that designating critical habitat is both prudent and determinable for the elfin-woods warbler, and we propose a total of approximately 10,977 ha (27,125 ac) of critical habitat for the species in Puerto Rico. We proposed to list the elfin-woods warbler as a threatened species under the Act on September 30, 2015 (80 FR 58674). Elsewhere in this issue of the **Federal Register** we have published a final rule to list the elfin-woods warbler as threatened with a 4(d) rule (**INSERT FEDERAL REGISTER CITATION FOR THE FINAL LISTING RULE**]).

*The basis for our action.* Section 4(a)(3) of the Act requires the Secretary to designate critical habitat, to the maximum extent prudent and determinable, for an

endangered or threatened species at the time it is listed. Section 4(b)(2) of the Act states that the Secretary shall designate critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat.

*We prepared a draft economic analysis of the proposed designation of critical habitat.* In order to consider economic impacts, we have prepared a draft economic analysis for the proposed critical habitat designation. We hereby announce the availability of the draft economic analysis and seek public review and comment.

*We will seek peer review.* We are seeking comments from independent specialists to ensure that our critical habitat proposal is based on scientifically sound data and analyses. We invite these peer reviewers to comment on our specific assumptions and conclusions in this proposal to designate critical habitat. Because we will consider all comments and information we receive during the comment period, our final designation may differ from this proposal.

## **Information Requested**

We intend that any final action resulting from this proposed rule will be based on the best scientific data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

1. The reasons why we should or should not designate habitat as “critical habitat”

under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

2. Specific information on:

- a. The amount and distribution of the elfin-woods warbler's habitat;
- b. What areas, that were occupied at the time of listing (i.e., are currently occupied) and that contain the physical and biological features essential to the conservation of the species, should be included in the designation and why;
- c. Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and
- d. What areas not occupied at the time of listing (i.e., not currently occupied) are essential for the conservation of the species and why.

3. Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

4. Information on the projected and reasonably likely impacts of climate change on the elfin-woods warbler and proposed critical habitat.

5. Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the benefits of including or excluding areas that exhibit these impacts.

6. Information on the extent to which the description of economic impacts in the draft economic analysis (DEA) is a reasonable estimate of the likely economic impacts.

7. The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the associated documents of the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.
8. Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.
9. Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

All comments submitted electronically via <http://www.regulations.gov> will be presented on the website in their entirety as submitted. For comments submitted via hard copy, we will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. You may request at the top of your document that we withhold personal information such as your street address, phone number, or e-mail address from public review; however, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on

*http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

### **Previous Federal Actions**

All previous Federal actions are described in the proposal to list the elfin-woods warbler as a threatened species under the Act published on September 30, 2015 (80 FR 58674).

### **Critical Habitat**

#### *Background*

Critical habitat is defined in section 3 of the Act as:

1. The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features
  - a. Essential to the conservation of the species, and
  - b. Which may require special management considerations or protection;and
2. Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.



Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the

geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In defining those physical and biological features within an area, we focus on the specific features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential for the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the

Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species, the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts’ opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the listed species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded

by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat, as applicable under the proposed 4(d) rule for this species (80 FR 58674; September 30, 2015). Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. With the listing of the elfin-woods warbler, published elsewhere in this issue of the **Federal Register**, these protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

#### *Prudency Determination*

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist:

1. The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or
2. Such designation of critical habitat would not be beneficial to the species. In

determining whether a designation would not be beneficial, the factors the Service may consider include but are not limited to: whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of "critical habitat."

As discussed in the proposed listing rule, there is currently no imminent threat of take attributed to collection or vandalism for this species, and identification and mapping of critical habitat is not expected to initiate any such threat. In the absence of finding that the designation of critical habitat would increase threats to a species, we determine if such designation of critical habitat would not be beneficial to the species. As discussed in our proposed listing rule, we have determined that the present or threatened destruction, modification, or curtailment of a species' habitat or range is a threat to the elfin-woods warbler. Furthermore, as discussed below, we have determined that three areas meet the Act's definition of "critical habitat."

Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and would be beneficial, we find that designation of critical habitat is prudent for the elfin-woods warbler.

#### *Critical Habitat Determinability*

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the elfin-woods warbler is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

1. Data sufficient to perform required analyses are lacking, or

2. The biological needs of the species are not sufficiently well known to identify any area that meets the definition of “critical habitat.”

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

At the time of the proposed listing, we found that critical habitat was not determinable because the specific information sufficient to perform the required analysis of the impacts of the designation was lacking. We have since acquired the appropriate information necessary to perform the impacts analysis. We have also reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. This and other information represent the best scientific data available and have now led us to conclude that the designation of critical habitat is determinable for the elfin-woods warbler.

#### *Physical or Biological Features*

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features (PBFs) that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

- Space for individual and population growth and for normal behavior;
- Food, water, air, light, minerals, or other nutritional or physiological requirements;

- Cover or shelter;
- Sites for breeding, reproduction, or rearing (or development) of offspring; and
- Habitats that are protected from disturbance or are representative of the historic, geographical and ecological distributions of a species.

We derive the specific PBFs essential for the elfin-woods warbler from studies of its habitat, ecology, and life history as described below. Additional information can be found in the proposed listing rule (80 FR 58674; September 30, 2015). We have determined that the following PBFs are essential to the conservation of the elfin-woods warbler.

#### Space for Individual and Population Growth and for Normal Behavior

The elfin-woods warbler is an endemic Puerto Rican bird with a very limited distribution, and it is typically observed in forested habitats with closed canopy and well-developed understory in higher elevations. Based on the best available information, there are only two known populations, one in eastern and one in western Puerto Rico. The eastern population occurs at El Yunque National Forest (EYNF) located within the Sierra de Luquillo mountains. The species' primary habitat at EYNF consists of the dwarf forest (Kepler and Parkes 1972, pp. 3–5) and the Palo Colorado forest (Wiley and Bauer 1985, pp. 12–18). The dwarf forest falls within the lower montane rain forest life zone (Ewel and Whitmore 1973, p. 49). It is found on exposed peaks with short, stunted vegetation above 900 meters (m) (2,952 feet (ft)) in elevation (Weaver 2012, p. 58). The dwarf forest is characterized by a single story of trees that range from 1 to 6 m (3 to 19 ft)

in height, depending on exposure (Weaver 2012, p. 58). However, trees located on rocky summits are limited to 2 to 3 m (6 to 10 ft) in height. Although no tree species is confined to this type of forest, only a few species, such as *Podocarpus coriaceus* (no common name), *Ocotea spathulata* (nemocá), and *Ilex sintenisii* (no common name), are adapted to survive on the exposed summits of this forest (Weaver 2012, p. 58). The dwarf forest is also characterized by the abundance of mosses, epiphytes, and liverworts that cover the majority of the forest surface (Lugo 2005, p. 514). The Palo Colorado forest occurs on gentle slopes within the lower montane wet and lower montane rain forest life zones, approximately between 600 and 900 m (1,968 and 2,952 ft) in elevation (Weaver 2012, p. 1; U.S. Forest Service (USFS), no date). This forest type mainly consists of fast-growing trees with heights not exceeding more than 24 m (78 ft) (Lugo 2005, p. 506). This forest type is essentially an upland swamp of short-statured trees with shallow root systems (USFS, not date). Some of the most common tree species are *Cyrilla racemiflora* (Palo Colorado), *Prestoea montana* (Sierra palm), *Ocotea spathulata*, and *Croton poecilanthus* (sabinón) (Weaver 2012, p. 55). The understory of the Palo Colorado forest is dominated by grasses, bromeliads, ferns, and sedges (Lugo 2005, p. 508).

The western population of the elfin-woods warbler is located within the Maricao Commonwealth Forest (MCF) and adjacent agricultural lands. The MCF is located within the Cordillera Central (central mountain range) of Puerto Rico. The primary habitat of the western population consists of the *Podocarpus* forest, exposed ridge woodland, and timber plantation forests (González 2008, pp. 15–16). The *Podocarpus* forest is located on the slopes and highest peaks (600–900 m (1,968–2,952 ft)) within the



lower montane wet forest life zone (DNR 1976, p. 185; Ewel and Whitmore 1973, p. 41). At the MCF, this type of forest grows on deep serpentine soils and is dominated by *Podocarpus coriaceus* trees; a continuous closed canopy of approximately 20 m (66 ft) of height; and a well-developed understory composed of tree ferns (*Cyathea* spp.), Sierra palm, and vines (Tossas and Delannoy 2001, pp. 47–53; Anadón-Irizarry 2006, p. 53; González 2008, pp. 15–16). The exposed ridge woodland forest is found in valleys, slopes, and shallow soils with a more or less continuous canopy (González 2008, pp. 15–16). These forest associations are found at elevations ranging from 550 to 750 m (1,804 to 2,460 ft) within the subtropical wet forest life zone (DNR 1976, p. 185; Ricart-Pujals and Padrón-Vélez 2010, p. 9). The timber plantation forest is found in elevations ranging from 630 to 850 m (2,066 to 2,788 ft) within the subtropical wet forest and the subtropical moist forest life zones (DNR 1976, p. 185). This habitat is dominated by *Calophyllum calaba* (María trees), *Eucalyptus robusta* (eucalyptus), and *Pinus caribaea* (Honduran pine) planted in areas that were deforested for agriculture (Delannoy 2007, p. 9; González 2008, p. 5).

In the privately owned lands adjacent to the MCF, the species has been reported mainly within secondary forests (both young and mature secondary forests) and shade-grown coffee plantations (González 2008, pp. 15–16). The young secondary forests are less than 25 years old with an open canopy of approximately 12–15 m (40–50 ft) in height (González 2008, p. 6). These forests are found within the subtropical moist and subtropical wet forest life zones at elevations ranging from 300 to 750 m (984 to 2,460 ft) (González 2008, p. 59; Puerto Rico Planning Board 2015, no page number), and cover approximately 98 percent of the MCF (DNR 1976, p. 185). The understory is well-

developed and dominated by grasses, vines, and other early successional species (González 2008, p. 6). Mature secondary forests are over 25 years old, developing in humid and very humid, moderate to steep slopes. These forests are characterized by a closed canopy of approximately 20–30 m (66–100 ft) in height and sparse to abundant understory (González 2008, p. 6). The shade-grown coffee plantations are covered with tall mature trees, dominated mostly by *Inga vera* (guaba), *Inga laurina* (guamá), *Andira inermis* (moca), and *Guarea guidonia* (guaraguao) trees, reaching 15–20 m (50–66 ft) in height, with an open understory without grasses (González 2008, p. 6). These shade-grown coffee plantations, located adjacent to the MCF at elevations between 300 and 600 m (984 and 1,968 ft), extend the vegetation cover and provide habitat for the species (González 2008, p. 59).

Limited information exists about the species' nesting sites and behavior. However, it is known that the elfin-woods warbler utilizes these forested habitats for its nest construction. According to the habitat suitability model developed for the species, all of the habitats described above occur within the intermediate to very high adequacy category (Colón-Merced 2013, p. 57). This model was developed based on a combination of elevation and vegetation cover from areas where the species is known to occur. In addition, as mentioned above, the species appears to be associated with high elevations and is seldom observed in elevations lower than 300 m (984 ft). The habitat types identified above are the only habitats that the species is known to occupy and use for normal behavior and that support the elfin-woods warbler's life-history processes. Thus, the protection and maintenance of these forested habitat features are essential for rearing, growth, foraging, migration, and other normal behaviors of the species.

Therefore, based on the available information describing the habitat used by the elfin-woods warbler, we identified the dwarf, Palo Colorado, *Podocarpus*, exposed ridge woodland, and timber plantation forests; secondary forests; and shade-grown coffee plantations as PBFs essential to the conservation of the species.

#### Cover or Shelter

As described above in “Space for Individual and Population Growth and for Normal Behavior,” the elfin-woods warbler occurs in higher densities within the dwarf, Palo Colorado, *Podocarpus*, exposed ridge woodland, and timber plantation forests; secondary forests; and shade-grown coffee plantations (Delannoy 2007, p. 14; Anadón-Irizarry 2006, p. 23; González 2008, pp. 15–16; Arendt *et al.* 2013, p. 8). The vegetation association and structure (i.e., tree species and forest structure) of these forest types provide cover for nesting and the rearing of offspring (see “Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring,” below). Therefore, dwarf, Palo Colorado, *Podocarpus*, exposed ridge woodland, and timber plantation forests; secondary forests; and shade-grown coffee plantations provide cover and shelter, and are PBFs essential for the persistence and survival of the elfin-woods warbler.

#### Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

There is little quantitative information about the elfin-woods warbler’s breeding, reproduction, and offspring development. However, based on the best available information, shaded and forested corridors are features that are essential to accommodate the species’ normal behaviors including breeding, reproduction, and rearing. The elfin-

woods warbler's breeding occurs between March and June (Raffaele *et al.* 1998, p. 406). The first elfin-woods warbler nest was found in 1985 at EYNF (Arroyo-Vázquez 1992, p. 362). At that time, no detailed information on the species' breeding biology was gathered (Arroyo-Vázquez 1992, p. 362). Later, Arroyo-Vázquez (1992) found two elfin-woods warbler nests in the MCF area. Both nests were found within the *Podocarpus* forest, placed in trees among dry leaf litter trapped in vegetation or vines at heights between 1.3 and 7.6 m (4.3 and 25.0 ft) (Arroyo-Vázquez 1992, pp. 362–364). Raffaele *et al.* (1998, p. 406) described the species' nest as a compact cup, usually close to the trunk and well hidden among epiphytes of small trees. Clutch size is usually two to three eggs, but there have been observations of nests that contain broods of up to four nestlings (Raffaele *et al.* 1998, p. 406; Rodríguez-Mojica 2004, p. 22). In 2004, Rodríguez-Mojica (2004, p. 22) reported the first nesting event in a cavity of a rotten *Cyrilla racemiflora* stump in the MCF area. The nest was placed about 7 m (23 ft) above ground and 6 centimeters (cm) (2 inches (in)) deep from the lower border of the irregular rim of the stump. Nesting events in cavities are not a common behavior of warblers, either in the tropics or in North America (Rodríguez-Mojica 2004, p. 22). Therefore, the discovery of a warbler nest in a tree cavity is significant, as no other warblers have been reported using such a site (Rodríguez-Mojica 2004, p. 23).

Therefore, based on the above information, we identified the *Podocarpus* and the Palo Colorado forest associations (shaded and forested corridors) as PBFs essential to the conservation of the elfin-woods warbler as they provide habitat for breeding, reproduction, and rearing.

In summary, the PBFs essential for the conservation of the elfin-woods warbler

are:

1. Wet and rain montane forest types:

a. *Podocarpus* forest at elevations between 600 and 900 m (1,968 and 2,952 ft) with continuous closed canopy of 20 m (66 ft) in height, dominated by *Podocarpus coriaceus* trees with well-developed understory.

b. Dwarf forest at elevations above 900 m (2,952 ft) with a single story of trees between 1 and 6 m (3 and 19 ft) in height, with an understory of mosses, epiphytes, and liverworts.

c. Palo Colorado forest at elevations between 600 and 900 m (1,968 and 2,952 ft) with a closed canopy of approximately 20 m (66 ft) and an understory dominated by grasses, ferns, bromeliads, and sedges.

2. Forested habitat areas that contain:

a. Active shade-grown coffee plantations or forested agricultural lands dominated primarily by native vegetation; or

b. Abandoned coffee plantations or agricultural lands with native forest cover and a closed canopy.

3. Forested habitat (at elevations between 300 and 850 m (984 and 2,788 ft)) not contained within the habitats described in PBF 1 or PBF 2:

a. Exposed ridge woodland forest found in valleys, slopes, and shallow soils with a more or less continuous canopy at elevations ranging from 550 to 750 m (1,804 to 2,460 ft);

b. Timber plantation forest at elevations ranging from 630 to 850 m (2,066 to 2,788 ft); or

c. Secondary forests dominated by native tree species with a closed canopy of approximately 20–30 m (66–100 ft) in height at elevations ranging from 300 to 750 m (984 to 2,460 ft).

### *Special Management Considerations or Protection*

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain PBFs which are essential to the conservation of the species and which may require special management considerations or protection.

The occupied units we are proposing to designate as critical habitat for the elfin-woods warbler will require some level of management to address the current and future threats to the PBFs. The proposed Maricao unit contains privately owned agricultural lands in which various activities may affect one or more of the PBFs. The features of this unit essential to the conservation of this species may require special management considerations or protection to reduce the following threats or potential threats that may result in changes in the composition or abundance of vegetation inside this unit: Loss, fragmentation, and degradation of habitat due to unsustainable agricultural practices; hurricanes; and human-induced fires. The features of the El Yunque unit may require special management considerations or protection to reduce threats or potential threats from hurricanes and human-induced fires, which may be exacerbated by the effects of climate change.

Management activities that could ameliorate these threats or potential threats include but are not limited to: The candidate conservation agreement (CCA) signed in 2014 among the Service, U.S. Forest Service, and Puerto Rico Department of Natural and Environmental Resources (PRDNER) to implement conservation practices for the benefit of the elfin-woods warbler and their habitat in EYNF and MCF (USFWS 2014); implementation of conservation agreements with private land owners to restore habitat, and to minimize habitat disturbance, fragmentation, and destruction; and development and implementation of management plans for other protected lands where the species is found.

#### *Criteria Used To Identify Critical Habitat*

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify occupied areas at the time of listing that contain the features essential to the conservation of the species. We also consider whether designating additional areas—outside those currently occupied—are essential for the conservation of the species.

Because of the vulnerability associated with small populations, limited distributions, or both, conservation of species such as the elfin-woods warbler should include the protection of both existing and potential habitat, and the establishment of new populations to reduce or eliminate such vulnerability. Therefore, for the elfin-woods

warbler, in addition to areas occupied by the species at the time of listing, we also are proposing to designate habitat outside the geographical area occupied by the species at the time of listing that was historically occupied, but is presently unoccupied, because it is essential for the conservation of the species.

Sources of data for the elfin-woods warbler and its habitat include reports on assessments and surveys throughout the species' range, peer-reviewed scientific and academic literature, habitat suitability models, personal communications with the species experts (e.g., Colón-Merced 2013; González 2008; Anadón-Irizarry 2006; Delannoy 2007; Arroyo-Vázquez 1992; Pérez-Rivera 2014, pers. comm.); and information from Service biologists. Other sources include databases maintained by Commonwealth and Federal agencies regarding Puerto Rico (such as elevation data, land cover data, aerial imagery, protected areas, and U.S. Geological Survey (USGS) topographic maps). Critical habitat units were then mapped using ArcMap version 10 (Environmental Systems Research Institute, Inc.), a geographic information system (GIS) program.

To further refine the boundaries, we used an existing elfin-woods warbler habitat suitability model (Colón-Merced 2013, p. 51). This model utilized variables such as elevation and vegetation cover to predict suitable habitat for this species in Puerto Rico (Colón-Merced 2013, p. 45). This model has been validated in several locations in Puerto Rico (BirdLife and SOPI, final report in progress).

In order to identify essential habitat within private lands adjacent to the MCF, we established a buffer zone of 500 m (0.31 mile (mi)) from the boundary line of the MCF to include forested areas in abandoned and active shade-grown coffee plantations where the elfin-woods warbler has been reported on the north, east, and west sides of the forest



(González 2008, p. 59). We used 500 m (0.31 mi) as our buffer zone because our best understanding of the available information (e.g., spatial data and on-the-ground data) is that this area encompasses suitable habitat that supports the conservation of the elfin-woods warbler.

#### *Areas Occupied at the Time of Listing*

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as: An area that may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals). The elfin-woods warbler tends to exhibit high site-fidelity (Anadón-Irizarry 2006, p. 6; Waide 1995, p. 11). However, the species can disperse to take advantage of changing conditions through space and time (e.g., during hurricanes; Waide 1995, p. 16).

The proposed critical habitat designation focuses on occupied forested areas within the species' historical range containing the PBFs that will allow for the maintenance and expansion of existing populations and for possible new populations. Two areas meet the definition of areas occupied by the species at the time of listing: (1) EYNF; and (2) MCF and adjacent private lands to the north, east, and west.

#### *Areas Outside of the Geographic Range at the Time of Listing*

For areas not occupied by the species at the time of the proposed listing (September 30, 2015), we must demonstrate that the areas are essential for the conservation of the species. To determine if these areas are essential for the conservation of the elfin-woods warbler, we considered:

- The importance of the area to the overall status of the species to prevent extinction and contribute to the species' conservation;
- Whether the area contains the necessary habitat to support the species;
- Whether the area provides connectivity between occupied sites for genetic exchange; and
- Whether a population of the species could be reestablished in the area.

The Carite Commonwealth Forest (CCF) is within the historical range of the elfin-woods warbler, within the Sierra de Cayey mountains in southeast Puerto Rico (Silander *et al.* 1986, p. 178); the Sierra de Cayey mountains are connected to the Cordillera Central mountains, which extend from Aibonito in the east to Maricao in the west of Puerto Rico (Monroe 1980, p. 16). However, the species has not been reported in CCF in recent years (Anadón-Irizarry 2006, p. 34; Pérez-Rivera 2014, pers. comm.; Aide and Campos 2016).

The CCF has been managed for conservation by the PRDNER since 1975 (previously Department of Natural Resources (DNR); DNR 1976, p. 169). This forest covers about 2,695 ha (6,660 ac), and ranges between 250 and 903 m (820 and 2,962 ft) in elevation (DNR 1976, p. 168). The mean annual precipitation is 225 cm (88.5 in), and

the mean temperature is 22.7 degrees Celsius (°C) (72.3 degrees Fahrenheit (°F)) (DNR 1976, p. 169; Silander *et al.* 1986, p. 183).

The CCF contains the following forest types: dwarf forest, Palo Colorado forest, timber plantation forest, and secondary forests. These are the same forest types used by the elfin-woods warbler in EYNF and MCF. These forest types are located within the same life zones in CCF as they are in EYNF and MCF (Ewel and Whitmore 1973, p. 74). The dwarf forest is found on exposed peaks and ridges of Cerro La Santa, above 880 m (2,887 ft) in elevation, occupying approximately 10.1 ha (24.9 ac) of the forest (Silander *et al.* 1986, p. 178). The dwarf forest vegetation is characterized by gnarled trees less than 7 m (23 ft) tall (Ewel and Whitmore 1973, p. 45). This habitat is dominated by *Tabebuia schumanniana* (roble colorado), *Tabebuia rigida* (roble de sierra), *Ocotea spathulata*, and *Henriettea squamulosum* (no common name) (Weaver *et al.* 1986, p. 80; Silander *et al.* 1986, p. 191). The Palo Colorado forest occupies 252.9 ha (625 ac) of the CCF (Silander *et al.* 1986, p. 188). This forest type is within the upper montane forest in slopes and mountain peaks at elevations from 700 to 850 m (2,297 to 2,788 ft). The most common tree species are *Inga fagifolia* (no common name), *Micropholis chrysophylloides* (no common name), *Prestoea montana*, and *Cyrilla racemiflora*. Tree height varies from 14 to 15 m (46 to 50 ft) at lower slopes, and from 6 to 8 m (20 to 26 ft) at mountain peaks (Silander *et al.* 1986, p. 188). The timber plantation forest occupies about 400.5 ha (989.0 ac) of the CCF (Silander *et al.* 1986, p. 188). Timber plantation forests are dominated by *Eucalyptus robusta* and *Calophyllum antillanum* (no common name) (Silander *et al.* 1986, p. 196). The secondary forest occupies 11.3 ha (28.0 ac) of the CCF (Silander *et al.* 1986, p. 188).

Although studies conducted by Anadón-Irizarry (2006, 2014) between 2003–2004 and 2012–2013 failed to detect the species within the CCF, she suggested the possibility that the species may still be present in isolated pockets of forest that were not searched during the studies (Delannoy 2007, p. 22). The apparent persistent and relatively sedentary behavior of this species, in inhabiting certain small and isolated pockets of the forest, might have led these authors to suggest that CCF may harbor undetected elfin-woods warblers (Anadón-Irizarry 2006, p. 54; Delannoy 2007, pp. 22–23; Pérez-Rivera 2014, pers. comm.). However, surveys contracted by the Service and conducted between March and April 2016, did not detect the species within the CCF and adjacent private lands (Aide and Campos 2016). In any case, we still believe that CCF contains habitat that may be suitable for the elfin-woods warbler due to its similarity in elevation, climatic conditions, and vegetation associations with EYNF and MCF (Colón-Merced 2013, p. 57). This area contains habitat with “intermediate to very high adequacy” (favorable to optimal combination of elevation and vegetation cover regarding the known elfin-woods warbler habitat) according to the habitat suitability model for the species (Colón-Merced 2013, p. 57).

The CCF provides the necessary habitat to support the elfin-woods warbler in the easternmost part of the Cordillera Central. The presence of suitable habitat characteristics and historic occurrence of the species within the CCF increase the opportunity for future reestablishment of a population of elfin-woods warblers in this forest. In addition, the connectivity between MCF and CCF through the Cordillera Central is expected to result in genetic exchange between the existing MCF populations and CCF populations that may be reestablished in the future. It should be noted that

while there is connectivity between MCF and CCF, the EYNF is within the Sierra de Luquillo mountains with lower elevation and development between the mountain ranges that significantly reduces connectivity between CCF and EYNF. For the above-mentioned reasons, we conclude that suitable habitat within the CCF meets the four considerations described above, and is therefore essential for the conservation of the elfin-woods warbler.

In summary, we are proposing to designate as critical habitat two units that we have determined are occupied at the time of listing and contain sufficient elements of PBFs to support life-history processes essential to the conservation of the species, and one unit outside of the geographical area occupied at the time of listing that we have determined is essential for the conservation of the species. Some units contain all of the identified elements of PBFs and support multiple life-history processes, and some units contain only some of those elements.

The proposed critical habitat designation is defined by the maps, as modified by any accompanying regulatory text, presented at the end of this document in the **Proposed Regulation Promulgation** section. We include more detailed information on the boundaries of the proposed critical habitat designation in the individual unit descriptions below. We will make the coordinates, plot points, or both on which each map is based available to the public on <http://www.regulations.gov> at Docket No. FWS-R4-ES-2016-0002, on our Internet site at <http://www.fws.gov/caribbean>, and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**, above).

When determining proposed critical habitat boundaries, we made every effort to

avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack PBFs for the elfin-woods warbler. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the PBFs in the adjacent critical habitat.

### **Proposed Critical Habitat Designation**

We are proposing to designate approximately 10,977 ha (27,125 ac) in three units as critical habitat for the elfin-woods warbler: Unit 1: Maricao, Unit 2: El Yunque, and Unit 3: Carite. Two units (Marico and El Yunque) are currently occupied and one unit (Carite) is currently unoccupied. Table 1 shows the land ownership and approximate size of each of the proposed critical habitat units.

Table 1: Location, occupancy status, ownership, and size (hectares (acres)) of proposed elfin-woods warbler critical habitat units.

Unit	Occupied	Municipality	Land Ownership in Hectares (Acres)			Total Area Hectares (Acres)
			Federal	Common- wealth	Private	
1: Maricao	Yes	Maricao, San Germán, Sabana	0	3,442 (8,506)	1,663 (4,109)	5,105 (12,615)

		Grande, Yauco				
2: El Yunque	Yes	Río Grande, Canovanas, Las Piedras, Naguabo, Ceiba	4,626 (11,430)	0	0	4,626 (11,430)
3: Carite	No	Cayey, San Lorenzo, Guayama, Patillas	0	1,246 (3,080)	0	1,246 (3,080)
Totals			4,626 (11,430)	4,688 (11,586)	1,663 (4,109)	10,977 (27,125)

Note: Area sizes may not sum due to rounding

We present brief descriptions of all units below.

#### Unit 1: Maricao

Unit 1 consists of a total of 5,105 ha (12,615 ac). Approximately 3,442 ha (8,506 ac) are owned by the Commonwealth and managed by the PRDNER and 1,663 ha (4,109 ac) are in private ownership. This unit is located within the municipalities of Maricao, San Germán, Sabana Grande, and Yauco. This unit encompasses the majority of the Maricao Commonwealth Forest. The unit is located north of State Road PR-2, south of State Road PR-105, and approximately 105 kilometers (km) (65 miles (mi)) west of the International Airport Luis Muñoz Marín. This unit is within the geographical area occupied by the elfin-woods warbler at the time of listing. This unit contains all of the PBFs. The PBFs in this unit may require special considerations or protection to address the following threats or potential threats that may result in changes in the composition or abundance of vegetation within this unit: Loss, fragmentation, and degradation of habitat due to unsustainable agricultural practices; hurricanes; and human-induced fires. This

unit represents a core population for the species and will likely contribute to range expansion of the elfin-woods warbler.

#### Unit 2: El Yunque

Unit 2 consists of 4,626 ha (11,430 ac) of federally owned land managed by the U.S. Forest Service (EYNF). It is located within the municipalities of Río Grande, Canovanas, Las Piedras, Naguabo, and Ceiba. The unit is located within EYNF located east of State Road PR-186, north of State Road PR-31, and approximately 24 km (15 mi) east of the International Airport Luis Muñoz Marin. This unit is within the geographical area occupied by the elfin-woods warbler at the time of listing. This unit contains PBFs 1(b) and 1(c) (see *Physical or Biological Features*, above). The PBFs in this unit may require special considerations or protection to reduce threats or potential threats from hurricanes and human-induced fires, which may be exacerbated by the effects of climate change. This unit represents a core population of the species and helps to maintain the elfin-woods warbler's geographical range.

#### Unit 3: Carite

Unit 3 consists of 1,246 ha (3,080 ac) of lands owned by the Commonwealth and managed by the PRDNER. It is located within the municipalities of Cayey, San Lorenzo, Guayama, and Patillas. The unit is located within the CCF west of State Road PR-7740 and State Road PR-184 that runs within the CCF, and approximately 37 km (23 mi) south of the International Airport Luis Muñoz Marin. This unit was not occupied by the elfin-woods warbler at the time of listing. As discussed above (see *Criteria Used to Identify*



*Critical Habitat*), this unit provides an opportunity for expansion of the species' documented current range into an area that was previously occupied; this potential expansion will help to increase the redundancy and resiliency of the species and is therefore essential for the conservation of the species.

## **Effects of Critical Habitat Designation**

### *Section 7 Consultation*

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

On February 11, 2016, the Service and National Marine Fisheries Service published a final rule in the Federal Register (81 FR 7214) revising the definition of “destruction or adverse modification” in the implementing regulations at 50 CFR 402.02. Destruction or adverse modification is defined as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species” that “may include, but are not limited to, those that alter the physical or

biological features essential to the conservation of a species or that preclude or significantly delay development of such features.”

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

1. A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or
2. A biological opinion for Federal actions that may affect and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse

modification of critical habitat. We define “reasonable and prudent alternatives” (at 50 CFR 402.02) as alternative actions identified during consultation that:

1. Can be implemented in a manner consistent with the intended purpose of the action,
2. Can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction,
3. Are economically and technologically feasible, and
4. Would, in the Director’s opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency’s discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

### *Application of the “Adverse Modification” Standard*

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that result in a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of the elfin-woods warbler. Such alterations may include, but are not limited to, those that alter the PBFs essential to the conservation of these species or that preclude or significantly delay development of such features. As discussed above, the role of critical habitat is to support PBFs essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the elfin-woods warbler. These activities include, but are not limited to:

1. Actions that would significantly alter the structure and function of active shade-grown coffee plantations, abandoned coffee plantations, and/or agricultural lands with native forest cover and a closed canopy. These actions or activities may include, but are not limited to, deforestation, conversion of shade-grown coffee to sun-grown coffee

plantations, and unsustainable agricultural practices (i.e., agricultural and silvicultural practices other than sun- to shade-grown coffee conversion, and herbicide and pesticide use outside coffee plantations). These actions could degrade the habitat used by the elfin-woods warbler for feeding, reproducing, and sheltering.

2. Actions that would significantly alter the vegetation structure in and around the *Podocarpus*, dwarf, or Palo Colorado forests. These actions or activities may include, but are not limited to, habitat modification (e.g., deforestation, fragmentation, loss, introduction of nonnative species, expansion or construction of communication facilities, expansion of recreational facilities, pipeline construction, bridge construction, road rehabilitation and maintenance, habitat management), Federal and State trust species reintroductions, trail maintenance, camping area maintenance, research, repair and restoration of landslides, and any other activities that are not conducted in accordance with the consultation and planning requirements for listed species under section 7 of the Act. These activities could alter the habitat structure essential to the elfin-woods warbler and may create suitable conditions for other species that compete with or prey upon the elfin-woods warbler or displace the species from its habitat.

## **Exemptions**

### *Application of Section 4(a)(3) of the Act*

Section 4(a)(3)(B)(i) of the Act provides that: “The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural

resources management plan [INRMP] prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.” There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation.

### **Consideration of Impacts Under Section 4(b)(2) of the Act**

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of the elfin-woods warbler, the benefits of critical habitat include public

awareness of the presence of the elfin-woods warbler and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the elfin-woods warbler due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

We are not proposing to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a DEA concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**, above).

#### *Consideration of Economic Impacts*

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact

of a proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, which includes the existing regulatory and socioeconomic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (i.e., conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct an optional 4(b)(2) exclusion analysis.

For this proposed designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat (USFWS 2015). The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the elfin-woods warbler (Abt Associates, Inc. 2016). The purpose of the screening analysis is to filter out the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic



impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. The screening analysis filters out particular areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The screening analysis also assesses whether units that are unoccupied by the species may require additional management or conservation efforts as a result of the critical habitat designation for the species, which may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM, constitute our draft economic analysis (DEA) of the proposed critical habitat designation for the elfin-woods warbler and is summarized in the narrative below.

Executive Orders (E.O.) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable. We assess to the extent practicable the probable impacts, if sufficient data are available, to both directly and indirectly impacted entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely

to be affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the elfin-woods warbler, first we identified, in the IEM dated December 7, 2015, probable incremental economic impacts associated with the following categories of activities: forest management, silviculture/timber management, implementation of conservation/restoration practices, human-induced fire management, development or improvement of existing infrastructure (e.g., roads, water intakes, water pipelines, electric transmission lines), recreation facilities, agriculture, and single house development funded by the U.S. Department of Housing and Urban Development (HUD). We considered each industry or category individually.

Additionally, we considered whether these activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; it only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the elfin-woods warbler is present, Federal agencies will already be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species.. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into that consultation process. Additionally, the Service extends this finding to unoccupied habitat, noting that “any project modifications or conservation measures recommended to prevent adverse modification of the EWW CH will not differ from project modifications and conservation measures recommended to prevent the jeopardy of other federally listed co-occurring species in the area (e.g. Puerto Rican sharp-shinned hawk) (ABT Associate, Incorporated

2016, p.11).” These co-occurring species occupy areas that have been proposed as critical habitat for the EWW but are unoccupied by the species. Therefore, disproportionate impacts to any geographic area or sector are not likely as a result of this critical habitat designation.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (i.e., difference between the jeopardy and adverse modification standards) for the elfin-woods warbler’s critical habitat. Because the designation of critical habitat for the elfin-woods warbler was proposed within several months of the proposed listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which would result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential PBFs identified for critical habitat are the same features essential for the life history requirements of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the elfin-woods warbler would also likely adversely affect the essential PBFs of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the elfin-woods warbler is approximately 10,977 ha (27,125 ac) within three units. Two of the units are occupied

(89 percent of the total ha/ac) at the time of listing while one is not occupied (11 percent of the total ha/ac) at the time of listing (see Table 1, above). The proposed critical habitat designation consists of the following: Commonwealth lands (43 percent), Federal lands (42 percent), and private lands (15 percent).

Because the majority of the proposed critical habitat units are already managed for natural resource conservation, all proposed units have co-occurring federally listed species, and two of the three proposed units are occupied by the elfin-woods warbler, it is unlikely that costs will result from section 7 consultations considering critical habitat alone, consultations resulting in adverse modifications alone, or project modifications attributable to critical habitat alone. The only incremental costs predicted are the administrative costs due to additional consideration of adverse modification of critical habitat during section 7 consultations. Based on estimates from existing section 7 consultations on a surrogate listed species, the Puerto Rican sharp-shinned hawk, the DEA predicts that 5.4 technical assistance, 2.4 informal consultations, and 0.6 formal consultations per year will consider critical habitat for the elfin-woods warbler.

As a result of the critical habitat designation for the elfin-woods warbler, the PRDNER will incorporate the critical habitat under Commonwealth law through Appendix 2b under regulation 6766. This regulation introduces stricter requirements for critical, including a requirement to mitigate affected lands by a ratio of three to one. However, the DEA is unable to determine what, if any, incremental costs will result from this regulation because the Commonwealth regulation only applies to private agricultural lands where the Service already works to curb forest clearing. In addition, because there are other federally listed species in all units of the proposed critical habitat, the Service

finds that the designation of critical habitat for the elfin-woods warbler is unlikely to lead to changes in permitting processes by Commonwealth or local agencies or other land managers.

Stigma effects (the perceived effects of designating critical habitat) are likely to be minimal because in all proposed critical habitat units land managers already take measures to protect the elfin-woods warbler. Namely, in Federal and Commonwealth land (85 percent of proposed critical habitat), an existing Candidate Conservation Agreement and a designation as a “critical element” under the National Heritage Program formalize conservation measures for the elfin-woods warbler. In private lands (15 percent of proposed critical habitat), stigma effects are likely to be very little because much of the land is agricultural with little possibility of future development. In addition, the Service has a history of working with these farmers in conservation programs that consider the elfin-woods warbler.

Based on the finding that the critical habitat designation will have minimal impact on land use or other activities (i.e., there is little difference in the world due to the designation), the DEA concludes that benefits will also be minimal. Possible benefits, aside from the conservation of elfin-woods warbler, could include cultural heritage benefits and other non-use benefits. Due to limited data availability, however, the DEA does not monetize these benefits.

We do not have sufficient data to indicate that any concentration of impacts to any geographic area or sector is likely at this time. While Unit 1 has slightly more projected annual section 7 consultations than any other unit, the incremental costs of these section 7 consultations are likely to be very little. Other incremental costs, such as those that could

occur due to stigma effects, could concentrate impacts in private critical habitat units compared to Federal and Commonwealth lands.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule. We may revise the proposed rule or DEA to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

## **Exclusions**

### *Exclusions Based on Economic Impacts*

The DEA did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising her discretion to exclude any areas from this proposed designation of critical habitat for the elfin-woods warbler based on economic impacts.

During the development of a final designation, we will consider any additional economic impact information received through the public comment period. Accordingly, areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

### *Exclusions Based on National Security Impacts*

Under section 4(b)(2) of the Act, we consider whether there are lands where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the elfin-woods warbler are not owned or managed by the Department of Defense or Department of Homeland Security, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not intending to exercise her discretion to exclude any areas from the proposed designation based on impacts on national security.

#### *Exclusions Based on Other Relevant Impacts*

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

We are not considering any exclusions at this time from the proposed designation under section 4(b)(2) of the Act based on partnerships management, or protection afforded by cooperative management efforts. Some areas within the proposed designation are included in management plans or other conservation agreements such as Service's Wildlife Conservation Extension Agreements with private landowners, Natural Resources Conservation Service's conservation contracts with private landowners,

cooperative agreements with nongovernmental organizations (NGOs), and the CCA signed at the end of 2014 among the Service, U.S. Forest Service, and PRDNER to implement conservation practices for the recovery of the elfin-woods warbler within EYNF and MCF.

Although the initiatives with private landowners and NGOs promote the restoration and enhancement of elfin-woods warbler habitat adjacent to the EYNF and MCF, potential challenges such as limited resources and uncertainty about landowners' participation may affect the implementation of conservation practices that mitigate impacts of agricultural practices and ensure the conservation of the species' essential habitat. We do not anticipate any negative effects of designating critical habitat in areas where existing partnerships occur. Further, there are no tribal lands in Puerto Rico. Therefore, we are not considering any exclusions at this time.

## **Peer Review**

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data and analyses. We will invite these peer reviewers to comment during this public comment period.

We will consider all comments and information we receive during the comment period on this proposed rule during our preparation of a final determination.

Accordingly, the final decision may differ from this proposal.



## **Public Hearings**

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register** (see **DATES**, above). Such requests must be sent to the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

## **Required Determinations**

### *Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the

public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade

entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

The Service’s current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and, therefore, are not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7 only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. Federal agencies are not small entities. Therefore, because no small entities are directly regulated by this rulemaking, the Service certifies that, if promulgated, the proposed critical habitat

designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

*Energy Supply, Distribution, or Use—Executive Order 13211*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our DEA, we found that the designation of this proposed critical habitat would not significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue through the public review and comment period, and we will review and revise this assessment as warranted.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following findings:

1. This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5) through (7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or tribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect

is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

2. We do not believe that this rule would significantly or uniquely affect small governments because the majority of the proposed critical habitat units are already managed for natural resource conservation by the Federal government or the Commonwealth of Puerto Rico, and all proposed units have co-occurring federally listed species that are already being considered by the Commonwealth and municipalities for any actions proposed in the area. Therefore, a Small Government Agency Plan is not required.

#### *Takings—Executive Order 12630*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the elfin-woods warbler in a takings implications assessment. The Act does not authorize the Service to regulate

private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that this designation of critical habitat for elfin-woods warbler would not pose significant takings implications for lands within or affected by the designation.

*Federalism—Executive Order 13132*

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies in Puerto Rico. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and

responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the PBFs of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these local governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

#### *Civil Justice Reform—Executive Order 12988*

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the proposed rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of PBFs essential to the conservation of the species. The designated areas of critical habitat



are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This proposed rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This proposed rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act (42 U.S.C. 4321 et seq.)*

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

*Government-to-Government Relationship with Tribes*

In accordance with the President's memorandum of April 29, 1994

(Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. As discussed above, there are no tribal lands in Puerto Rico.

#### *Clarity of the Rule*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

1. Be logically organized;
2. Use the active voice to address readers directly;
3. Use clear language rather than jargon;
4. Be divided into short sections and sentences; and
5. Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of

the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

### **References Cited**

A complete list of references cited in this rulemaking is available on the Internet at <http://www.regulations.gov> and upon request from the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

### **Authors**

The primary authors of this proposed rulemaking are the staff members of the Caribbean Ecological Services Field Office.

### **List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

### **Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361-1407; 1531-1544; and 4201-4245, unless otherwise noted.

2. In § 17.95, amend paragraph (b) by adding an entry for “Elfin-woods Warbler (*Setophaga angelae*)” in the same alphabetical order that the species appears in the table at § 17.11(h), to read as follows:

### § 17.95 Critical habitat—fish and wildlife.

\* \* \* \* \*

(b) *Birds.*

\* \* \* \* \*

#### ELFIN-WOODS WARBLER (*SETOPHAGA ANGELAE*)

(1) Critical habitat units for the elfin-woods warbler are in Puerto Rico. Critical habitat units are depicted on the maps in this entry.

(2) Within the critical habitat units, the physical or biological features essential to the conservation of the elfin-woods warbler consist of three components:

(i) Wet and rain montane forest types:

(A) *Podocarpus* forest at elevations between 600 and 900 meters (m) (1,968 and 2,952 feet (ft)) with continuous closed canopy of 20 m (66 ft) in height, dominated by

*Podocarpus coriaceus* trees with well-developed understory.

(B) Dwarf forest at elevations above 900 m (2,952 ft) with a single story of trees between 1 and 6 m (3 and 19 ft) in height, with an understory of mosses, epiphytes, and liverworts.

(C) Palo Colorado forest at elevations between 600 and 900 m (1,968 and 2,952 ft) with a closed canopy of approximately 20 m (66 ft) and an understory dominated by grasses, ferns, bromeliads, and sedges.

(ii) Forested habitat areas that contain:

(A) Active shade-grown coffee plantations or forested agricultural lands dominated primarily by native vegetation; or

(B) Abandoned coffee plantations or agricultural lands with native forest cover and a closed canopy.

(iii) Forested habitat (at elevations between 300 and 850 m (984 and 2,788 ft)) not contained within the habitats described in paragraphs (2)(i) and (2)(ii) of this entry:

(A) Exposed ridge woodland forest found in valleys, slopes, and shallow soils with a more or less continuous canopy at elevations ranging from 550 to 750 m (1,804 to 2,460 ft);

(B) Timber plantation forest at elevations ranging from 630 to 850 m (2,066 to 2,788 ft); or

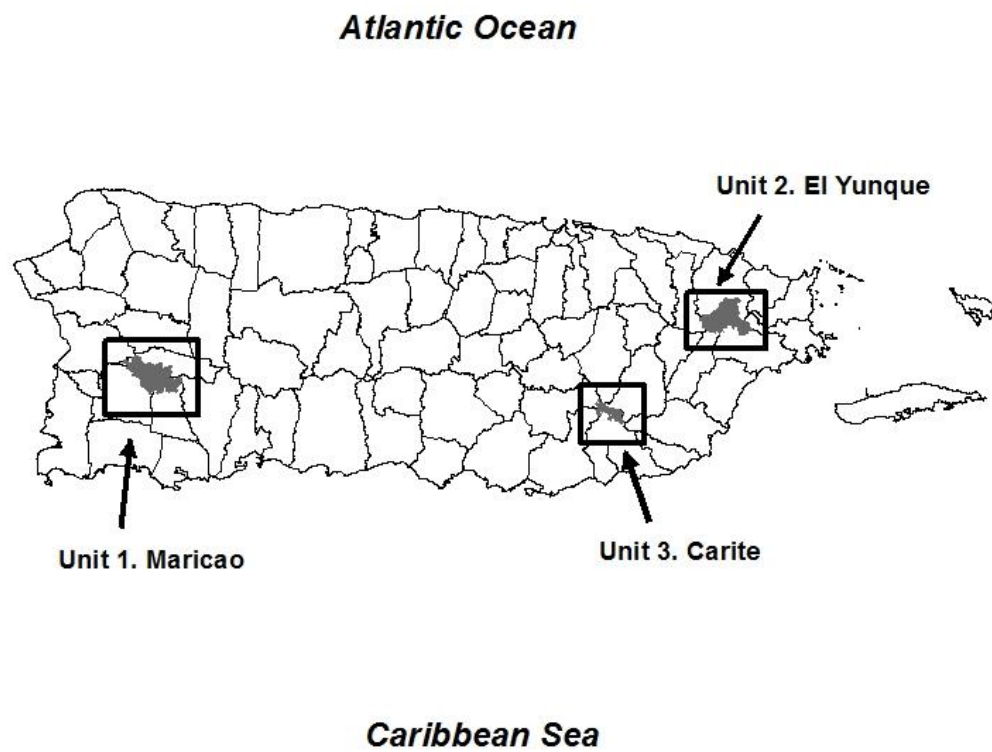
(C) Secondary forests dominated by native tree species with a closed canopy of approximately 20–30 m (66–100 ft) in height at elevations ranging from 300 to 750 m (984 to 2,460 ft).

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on [EFFECTIVE DATE OF FINAL RULE].

(4) *Critical habitat map units.* Data layers defining map units were created by delineating habitats that contain at least one or more of the physical or biological features defined in paragraph (2) of this entry, over a U.S. Department of Agriculture (USDA) 2007 digital ortho photo mosaic, over a base of U.S. Geological Survey (USGS) digital topographic map quadrangle, and with the use of a digital landcover layer. The resulting critical habitat unit was then mapped using State Plane North American Datum (NAD) 83 coordinates. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates, plot points, or both on which each map is based are available to the public at the Service's Internet site (<http://www.fws.gov/caribbean>), at <http://www.regulations.gov> at Docket No. FWS–R4–ES–2016–0002, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Note:* Index map follows:

Index Map of All Critical Habitat Units for  
Elfin-woods warbler (*Setophaga angelae*), Puerto Rico



Critical Habitat



Municipality Boundary

0 5 10 20 30 40 Miles

0 10 20 40 60 80 Kilometers



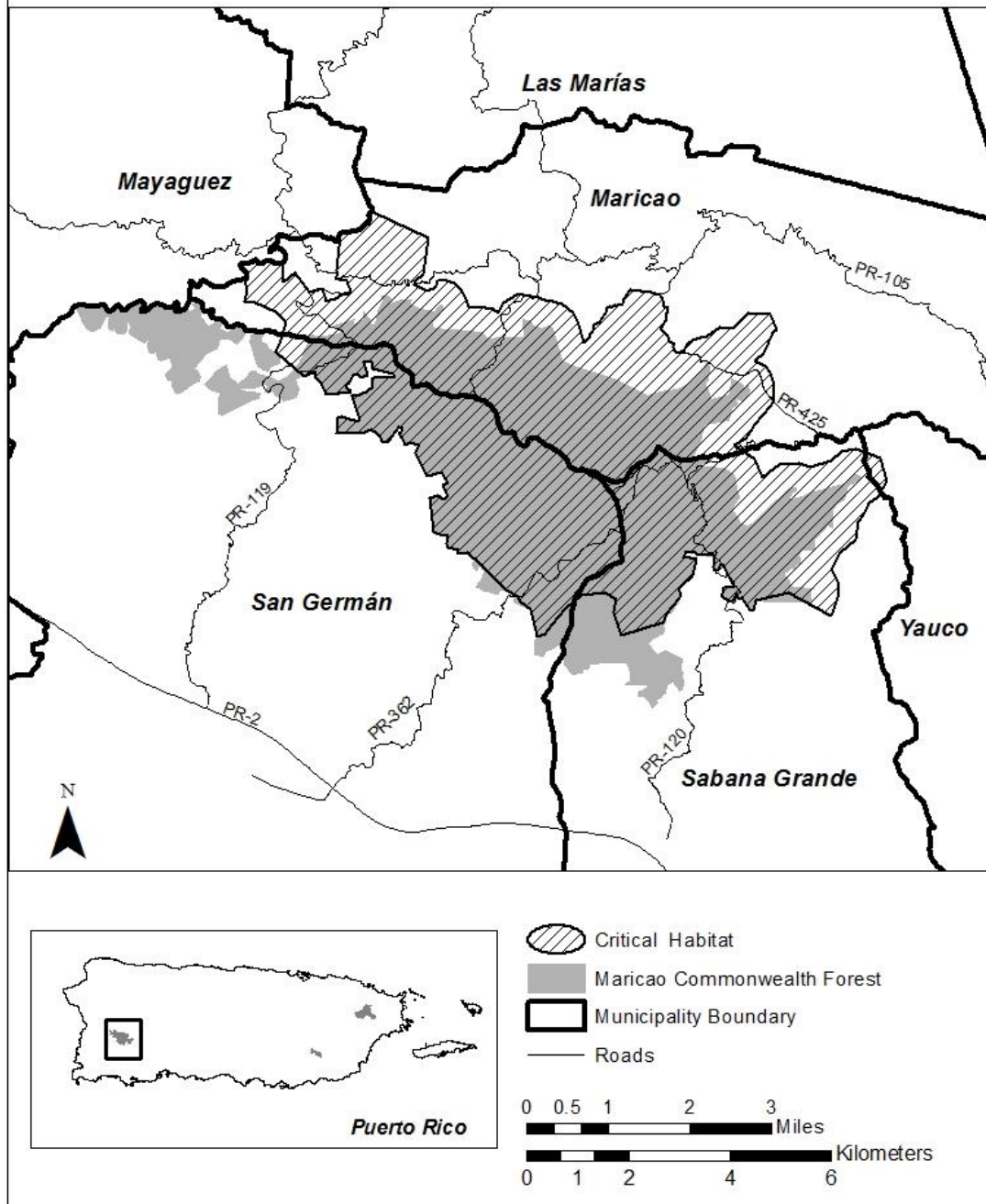
(6) Unit 1: Maricao; Maricao, San Germán, Sabana Grande, and Yauco Municipalities, Puerto Rico.

(i) *General description:* Unit 1 consists of a total of 5,105 hectares (ha) (12,615 acres (ac)). Approximately 3,442 ha (8,506 ac) are owned by the Commonwealth and managed by the Puerto Rico Department of Natural and Environmental Resources, and 1,663 ha (4,109 ac) are in private ownership. The unit is located north of State Road PR-2, south of State Road PR-105, and approximately 105 kilometers (km) (65 miles (mi)) west of the International Airport Luis Muñoz Marín.

(ii) Map of Unit 1 follows:



**Unit 1: Maricao: Critical Habitat for the Elfin-woods warbler (*Setophaga angelae*)  
in Maricao, San German, Sabana Grande and Yauco, Puerto Rico**

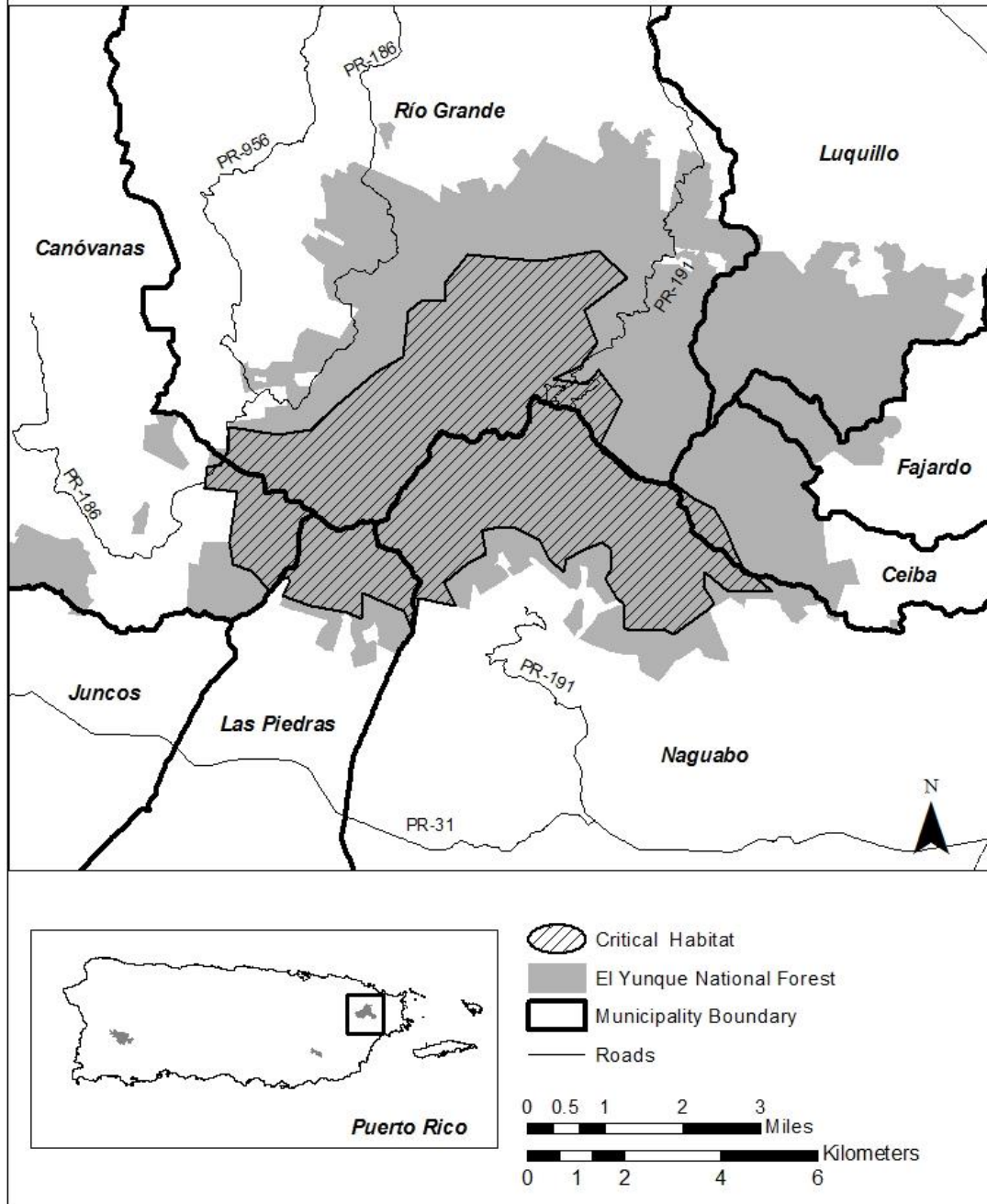


(7) Unit 2: El Yunque; Río Grande, Canovanas, Las Piedras, Naguabo, and Ceiba Municipalities, Puerto Rico.

(i) *General description:* Unit 2 consists of 4,626 ha (11,430 ac) of federally owned land managed by the U.S. Forest Service (El Yunque National Forest). The unit is located within El Yunque National Forest, east of State Road PR-186, north of State Road PR-31, and approximately 24 km (15 mi) east of the International Airport Luis Muñoz Marín.

(ii) Map of Unit 2 follows:

**Unit 2: El Yunque: Critical Habitat for the Elfin-woods warbler (*Setophaga angelae*)  
in Río Grande, Canóvanas, Las Piedras, Naguabo and Ceiba, Puerto Rico**

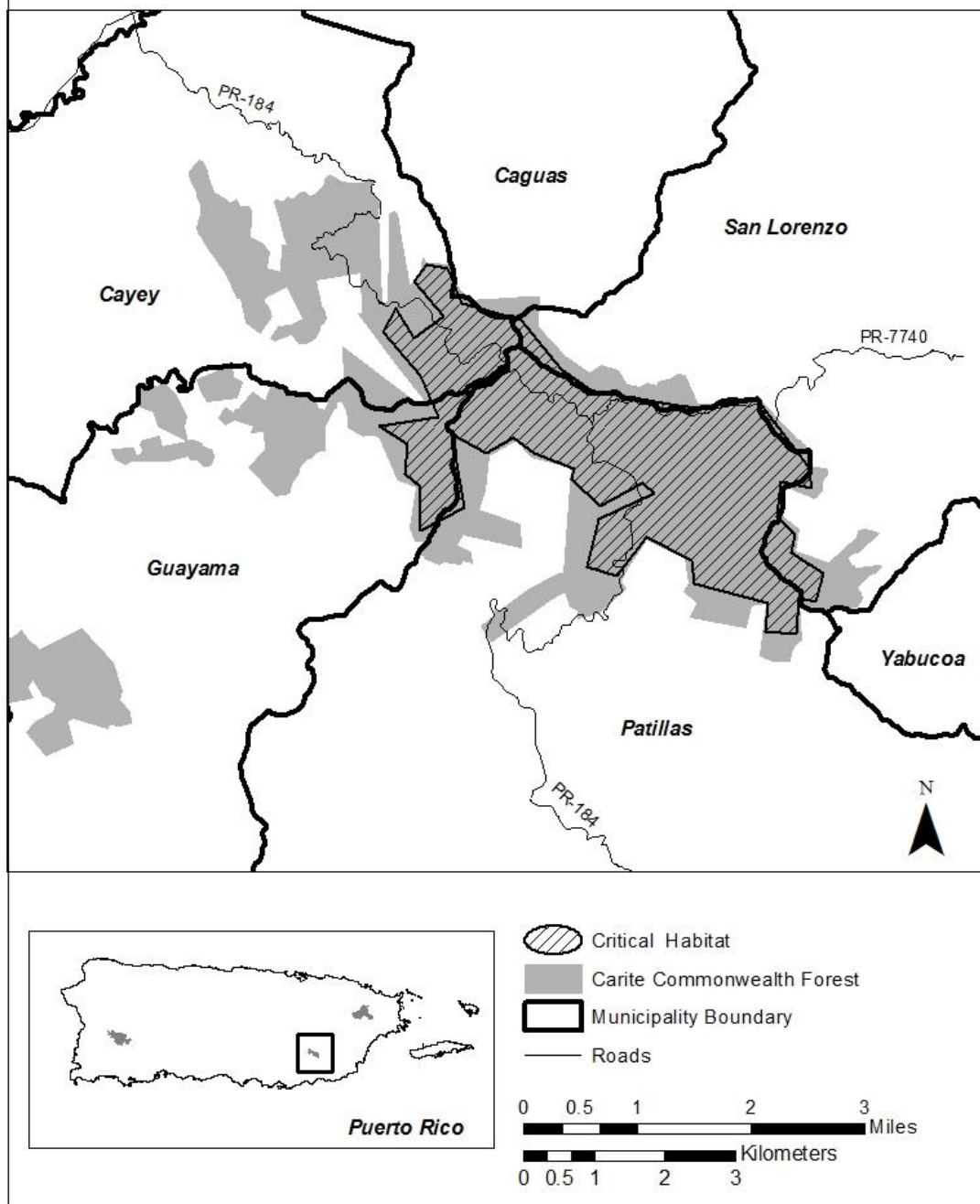


(8) Unit 3: Carite; Cayey, San Lorenzo, Guayama, and Patillas Municipalities, Puerto Rico.

(i) *General description:* Unit 3 consists of 1,246 ha (3,080 ac) of lands owned by the Commonwealth and managed by the Puerto Rico Department of Natural and Environmental Resources. The unit is located within the Carite Commonwealth Forest west of State Road PR-7740 and State Road PR-184 that run within the Carite Commonwealth Forest, and approximately 37 km (23 mi) south of the International Airport Luis Muñoz Marín.

(ii) Map of Unit 3 follows:

**Unit 3: Carite: Critical Habitat for the Elfin-woods warbler (*Setophaga angelae*)  
in Cayey, San Lorenzo, Patillas, and Guayama, Puerto Rico**



\* \* \* \* \*

Dated: June 7, 2016.

Karen Hyun

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4333-15-P

[FR Doc. 2016-14539 Filed: 6/21/2016 8:45 am; Publication Date: 6/22/2016]